Note

BALANCING LENITY, RATIONALITY, AND FINALITY: A CASE FOR SPECIAL VERDICT FORMS IN CASES INVOLVING OVERLAPPING FEDERAL CRIMINAL OFFENSES

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ABSTRACT

The Framers placed a high premium on jury independence and viewed the jury's ability to dispense lenity as an important check on the legislative and executive branches. Many features of the criminal justice system are designed to interpose the jury between the accused and overzealous legislators and prosecutors. The general verdict and the absolute finality of acquittals, for example, empower the jury to acquit a defendant against the weight of the evidence. Although these features of the criminal justice system were conceived to protect defendants, they may be more harmful than helpful to defendants, given changes in the criminal justice system since the Founding. The proliferation of overlapping federal offenses, for instance, is a change that directly implicates the opacity of the general verdict. This Note explains that, in a trial resulting in an acquittal on some charges and a mistrial on other charges, a lack of transparency in what the jury has necessarily decided can harm the defendant by making it difficult for him to invoke the collateral estoppel protection. This Note proposes using special verdict forms to prevent jury inconsistency and provide clarity in cases involving multiple federal criminal offenses based on the same underlying facts.

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INTRODUCTION

After thirteen weeks of trial and four days of deliberation, a jury acquitted former Enron executive Scott Yeager of securities fraud but failed to reach a verdict on the insider trading charges against him.[1] When the government sought to retry Yeager on the insider trading counts, he invoked the collateral estoppel protection[2] as a means to avoid reprosecution. To invoke this protection, a defendant must establish that the prosecution is seeking to relitigate an issue that the jury already decided in an acquittal.[3] In its effort to relitigate the insider trading counts on which the jury failed to reach a verdict, the government argued that Yeager could not invoke the collateral estoppel protection because he could not show that, in acquitting him of securities fraud, "the jury necessarily resolved in his favor an issue of ultimate fact" needed to convict him for insider trading.[4]

Although the offenses of securities fraud and insider trading do not necessarily overlap, Yeager argued that the charges in his case were based on the same underlying conduct.[5] But neither the indictment nor the jury's acquittal of Yeager on the securities fraud count make this clear.[6] And the district court (*Yeager I*)[7]and the United States Court of Appeals for the Fifth Circuit (*Yeager II*)[8] reached different conclusions about what Yeager's jury necessarily

1. Yeager v. United States (*Yeager III*), 129 S. Ct. 2360, 2364 (2009) (noting that the trial court, after urging the jury to reach a final verdict on all counts, ultimately took the jury's verdict after four full days of deliberation, entering judgment on the acquittals and declaring a mistrial on the hung counts).

2. The doctrine of collateral estoppel is a feature of the protection against double jeopardy. Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1, 1 (1989). Criminal defendants like Yeager invoke the collateral estoppel protection to bar reprosecution by establishing that the earlier acquittal resolved an ultimate issue of the successive charge in the defendant's favor. *See id.* ("Collateral estoppel is most commonly invoked to foreclose an issue resolved by an earlier acquittal and thus to bar prosecution entirely."). Part I of this Note discusses the evolution of the collateral estoppel doctrine in the criminal context.

3. *Ashe v. Swenson*, 397 U.S. 436 (1970), the leading Supreme Court case on collateral estoppel, explains that the protection "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443.

4. *Yeager*, 129 S. Ct. at 2370.

5. *See infra* note 51 and accompanying text.

6. *See infra* notes 174–77 and accompanying text.

7. United States v. Yeager (*Yeager I*), 446 F. Supp. 2d 719 (S.D. Tex. 2006).

8. United States v. Yeager (*Yeager II*), 521 F.3d 367 (5th Cir. 2008).

decided through its acquittal.[9] When the Supreme Court heard Yeager's collateral estoppel challenge in 2009 (*Yeager III*),[10] it adopted the Fifth Circuit's reading of the record—that no rational jury could have acquitted Yeager of securities fraud without also acquitting him of the insider trading charges. Reversing the Fifth Circuit's holding that the hung counts affected the preclusive effect of the acquitted counts, the Court held that, as a matter of law, an acquittal on some counts can have collateral estoppel effects in a successive prosecution of mistried counts.[11]

Yeager III acknowledged that determining the preclusive effect of Yeager's security fraud acquittal involved a "fact-intensive analysis of the voluminous record" that the court of appeals "may revisit . . . in light of the Government's arguments before this Court."[12] The Court, however, failed to offer any guidance on how a lower court should proceed in determining what a jury necessarily decided in its acquittals.[13] This Note proposes a solution that would simplify this analysis in cases like *Yeager* involving overlapping but not coextensive criminal offenses: special verdict forms tracking the common issues of law and fact for the jury to complete in deliberation and return in addition to its general verdict of guilt or acquittal.

Part I explains why modern criminal defendants are vulnerable to successive prosecution, provides an overview of Supreme Court precedent on successive prosecution and collateral estoppel, and presents the *Yeager* case as an illustration of the problem. Part II explores the strong interest in preserving the jury's independence in the criminal context through the lens of the Supreme Court's "do-nothing approach"[14] to verdict inconsistency, the traditional disfavor of special verdicts, and the continuing debate over the doctrine of jury

9. *Id.* at 377–78 (rejecting the district court's conclusion that the jury acquitted Yeager on the ground that he did not participate in the fraud and concluding instead that "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public").

10. Yeager v. United States (*Yeager III*), 129 S. Ct. 2360 (2009).

11. *Id.* at 2362–63 ("The question presented in this case is whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. We hold that it does not.").

12. *Id.* at 2370.

13. *Id.*

14. *See infra* note 70.

nullification.[15] Part III recommends using special verdict forms to track issues of law and fact common to overlapping but not coextensive federal criminal offenses.

I. THE PROBLEM: MODERN CRIMINAL DEFENDANTS INCREASINGLY VULNERABLE TO SUCCESSIVE PROSECUTION

Criminal defendants have become more vulnerable to successive prosecution as the number of federal criminal offenses has grown. The Supreme Court noted this phenomenon in *Ashe v. Swenson*,[16] in which it deemed the collateral estoppel doctrine part of the Fifth Amendment guarantee against double jeopardy:

> [U]nder early federal criminal statutes . . . . [a] single course of criminal conduct was likely to yield but a single offense. . . . [W]ith . . . the extraordinary proliferation of overlapping . . . offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. . . . [T]he potential for unfair and abusive reprosecutions became far more pronounced. . . . The federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel . . . .[17]

Given the proliferation of federal offenses[18] and strong prosecutorial incentives to maximize convictions,[19] the threat of successive prosecution is a major concern for modern criminal defendants. Against this background, this Part considers the development of the Supreme Court's double jeopardy jurisprudence and the role of collateral estoppel in preventing successive litigation. It concludes by using the *Yeager* case to highlight the difficulty of

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15. This Note uses the terms nullification and lenity to refer to the same phenomenon, namely, "the jury's return of a verdict of not guilty in a criminal case notwithstanding unequivocal evidence of guilt of the offense charged." NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES 191 (2d ed. 2009).

16. Ashe v. Swenson, 397 U.S. 436 (1970).

17. *Id.* at 445 n.10.

18. *See, e.g.*, John S. Baker, Jr., 5 ENGAGE 23, 23 (2004), *available at* http://www.fed-soc.org/doclib/20080313_CorpsBaker.pdf ("There are over 4,000 offenses that carry criminal penalties in the United States Code. This is a record number, and reflects a one-third increase since 1980.").

19. The Department of Justice allocates funds to U.S. Attorneys' offices based on conviction rates. In addition, many prosecutors have political ambitions, and being "tough on crime" appeals to voters. Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625, 633–35 (1995).

making collateral estoppel determinations in cases in which the conduct alleged supports multiple overlapping but not coextensive charges.

A. Overcriminalization, Double Jeopardy, and the Collateral Estoppel Protection

The redundancy and breadth of federal criminal offenses give prosecutors the ability to overcharge defendants.[20] In addition to having an extensive array of overlapping and open-ended charges at their disposal, federal prosecutors have broad discretion over the charging decision.[21] Prosecutors also control the decision whether to pursue a successive prosecution. (The main limits on this decision—the Department of Justice's *Petite* Policy,[22] resource constraints,[23] and the attitudes of federal judges[24]—can be manipulated.)

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20. The commentary on the implications of the explosive growth of federal criminal law is extensive. *See, e.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 *passim* (2005) (describing "common features connecting the different forms of overcriminalization"); Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1190 (2004) ("The proliferation of offenses is driven by political forces that encourage legislators to add to prosecutors' arsenals and discourage the repeal of criminal laws. Legislatures respond to newsworthy events or trends with new criminal provisions that often overlap with existing provisions.").

21. Lear, *supra* note 19, at 632 ("United States Attorneys have traditionally operated with almost complete autonomy. Even today the Justice Department rarely interferes in the charging decisions of local offices." (footnotes omitted)); Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. Rev. 1297, 1320–21 (1999) ("The prosecutor has nearly unfettered discretion to decide who to charge, what charges to file, and when to file them . . . ." (footnote omitted)).

22. *See* Petite v. United States, 361 U.S. 529, 530 (1960) (announcing the Department of Justice's successive-prosecution policy for the first time). It is the Justice Department's policy not to reprosecute unless the initial prosecution leaves "substantial federal interest[s] . . . demonstrably unvindicated." UNITED STATES ATTORNEY'S MANUAL § 9-2.031 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031.

23. United States v. Dixon, 509 U.S. 688, 710 n.15 (1993) ("Surely . . . the Government must be deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources.").

24. Federal judges do not appreciate prosecutors wasting the court's time and the public's money without a substantial federal interest. Lear, *supra* note 19, at 631.

In addition to imposing great costs on individual defendants[25] and the criminal justice system at large,[26] successive prosecution implicates the Double Jeopardy Clause.[27] The leading Supreme Court precedent on what constitutes the "same offence" for double jeopardy purposes is the *Blockburger*[28] same-elements test, which provides that, so long as two offenses contain a separate element, they are not technically the same.[29] The Court extended the same-elements test to the successive prosecution context in *United States v. Dixon*.[30]

Three years before deciding *Dixon*, the Court had rejected the use of the *Blockburger* same-elements test in the successive prosecution context in *Grady v. Corbin*,[31] which held that the government could not retry a defendant if proof of "*conduct* that constitutes an offense for which the defendant has already been prosecuted" was required to convict.[32] *Dixon* rejected this same-conduct test as "unstable in application," however, making *Grady* a short-lived precedent.[33]

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25. *See* United States v. Scott, 437 U.S. 82, 91 (1978) ("To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" (quoting Green v. United States, 355 U.S. 184, 188 (1957))); *Green*, 355 U.S. at 187–88 ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.").

26. *See* Lear, *supra* note 19, at 647 (explaining that crowded federal dockets are such that every criminal case that goes forward for reprosecution means that one less civil jury trial will occur); *id.* at 648–49 (describing successive prosecutions as a resource drain on U.S. Attorneys' offices); *id.* at 650–51 (explaining that successive prosecution undermines confidence in the system).

27. The Double Jeopardy Clause provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

28. Blockburger v. United States, 284 U.S. 299 (1932).

29. *Id.* at 304 ("The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

30. United States v. Dixon, 509 U.S. 688, 697 (1993).

31. Grady v. Corbin, 495 U.S. 508 (1990), *overruled by Dixon*, 509 U.S. 688.

32. *Id.* at 510 (emphasis added) (footnote omitted).

33. *Dixon*, 509 U.S. at 709. Two years after *Grady* was decided, the Court had to recognize a major exception to the same-conduct test based on the "longstanding authority" that prosecution for a substantive offense does not bar subsequent prosecution for conspiring to commit that offense. *See* United States v. Felix, 503 U.S. 378, 390–91 (1992) (holding that an underlying offense and conspiracy to commit that offense were "separate offenses for double jeopardy purposes").

Unlike the *Grady* same-conduct test, the *Blockburger* same-elements test embraced by *Dixon* in the successive prosecution context focuses on the statutory definitions of crimes to determine whether they are the "same offence."[34] Because the *Blockburger* test does not take the conduct alleged into account, it is, as *Dixon* suggested, easier to apply than the *Grady* same-conduct test. It is, however, also easier for prosecutors to manipulate. It would be permissible under *Blockburger* for a prosecutor unsatisfied with an acquittal to reprosecute the same conduct by charging the defendant with an offense containing one element not contained in the initially charged offense. Fortunately for criminal defendants, there is a protection besides the *Blockburger* test that may shield them from such an overzealous prosecutor: the collateral estoppel doctrine.

The collateral estoppel doctrine bars successive prosecution requiring relitigation of issues already decided in the defendant's favor.[35] It thus serves an important role in the Court's double jeopardy jurisprudence by providing a backstop for the *Blockburger* same-elements test. In the absence of the collateral estoppel protection, prosecutors could harass defendants through successive prosecution on technically separate offenses involving identical conduct.[36] The collateral estoppel doctrine is now recognized as part of the Fifth Amendment's guarantee against double jeopardy,[37] but it originally developed in the civil context. In *United States v. Oppenheimer*,[38] Justice Holmes made the case for extending the collateral estoppel protection to the criminal context, reasoning that, "[i]t cannot be that the safeguards of the person . . . are less than those that protect from a liability in debt."[39]

The collateral estoppel doctrine's civil roots have complicated the doctrine's application in the criminal context. In the civil context, special verdicts can be used to determine what a jury necessarily

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34. *Dixon*, 509 U.S. at 696 ("The same-elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.").

35. *See supra* notes 2–3 and accompanying text.

36. According to Justice Souter, "[i]f a separate prosecution were permitted for every offense arising out of the same conduct, the government could manipulate the definitions of offenses, creating fine distinctions among them and permitting a zealous prosecutor to try a person again and again for essentially the same criminal conduct." *Dixon*, 509 U.S. at 747 (Souter, J., concurring in the judgment in part and dissenting in part).

37. Ashe v. Swenson, 397 U.S. 436, 445 (1970).

38. United States v. Oppenheimer, 242 U.S. 85 (1916).

39. *Id.* at 87.

decided. In the criminal context, however, the general verdict makes this analysis very difficult, as recognized by the Supreme Court in *Ashe*:

> Where a previous judgment of acquittal was based upon a general verdict . . . this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue *other than that* which the defendant seeks to foreclose from consideration.'[40]

Ashe cautioned lower courts to approach the determination of what a jury necessarily decided "with realism and rationality."[41] Taking a more "technically restrictive" approach, the Court explained, "would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."[42]

The *Ashe* analysis is a fact-intensive one requiring close examination of the prior proceeding's record including the pleadings, evidence, and indictment.[43] In this way, it is more like the *Grady* same-conduct test, which looks at the conduct underlying the successive charges, than the *Blockburger* same-elements test, which looks only at the formal elements of the offenses. But the *Ashe* analysis may suffer from the same instability that led the Court to reject the *Grady* same-conduct test in *Dixon*.[44] In Yeager's case, for example, the district court and the Fifth Circuit reached critically different conclusions after conducting the *Ashe* analysis.[45]

B. A Closer Look at United States v. Yeager

The prosecution of Enron Broadband Services (EBS) executive Scott Yeager readily illustrates the problems posed by a general verdict of acquittal for a defendant seeking to bar a successive criminal prosecution. In 2004, a grand jury indicted Yeager on 126

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40. *Ashe*, 397 U.S. at 444 (emphasis added) (quoting Daniel K. Mayers & Fletcher L. Yarbough, Bis Vexari*: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960)).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See supra* note 33.

45. *See supra* notes 7–9.

counts of five federal offenses: (1) conspiracy to commit securities and wire fraud, (2) securities fraud, (3) wire fraud, (4) insider trading, and (5) money laundering.[46] Specifically, the indictment alleged that Yeager and two other senior EBS executives purposefully misled the public—in an effort to inflate the value of EBS stock and enrich themselves—about an intelligent telecommunications network that EBS was developing.[47] The allegedly false statements and material omissions were made at an analyst conference in 2000 and in press releases.[48]

The jury acquitted Yeager of the securities fraud, wire fraud, and conspiracy charges,[49] but failed to reach a verdict on the insider trading and money laundering charges.[50] When the government sought to retry Yeager on the hung counts, Yeager challenged the successive prosecution on collateral estoppel grounds, arguing that "(1) the acquitted . . . securities fraud . . . counts allege the same factual allegations that underpin the insider trading counts, and (2) the evidence presented at trial on the acquitted counts pertaining to alleged false statements and omissions made at the 2000 analyst conference and in press releases, is the very same evidence the government submitted on the insider trading counts."[51]

The district court and the Fifth Circuit read the tea leaves of the jury's acquittal of Yeager on the fraud counts differently. The Fifth Circuit concluded in *Yeager II* that "the jury must have found when it

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46. United States v. Yeager (*Yeager I*), 446 F. Supp. 2d 719, 722 (S.D. Tex. 2006) ("Count One [of the indictment] charged Defendant Yeager with conspiracy to commit securities fraud and wire fraud. Count Two of the Indictment charged Defendant Yeager with the substantive offense of securities fraud in connection with allegedly false statements and material omissions at a January 20, 2000 Analyst Conference. Counts Three through Six charged Defendant Yeager with the substantive offense of wire fraud in connection with press releases issued by Enron Broadband Services on January 31, 2000 through May 15, 2000. Counts Twenty-Seven through Forty-Six charged Defendant Yeager with insider trading based on trades of Enron stock made on January 21, 2000 through August 23, 2000. Counts Sixty-Seven through One Hundred Sixty-Five charged Defendant Yeager with money laundering based on transactions on February 7, 2000 through September 18, 2001." (citations omitted)).

47. United States v. Yeager (*Yeager II*), 521 F.3d 367, 370 (5th Cir. 2008) ("The indictment alleged that [the three EBS defendants] purposely sought to deceive the public by making false statements about EBS's progress and financial condition. . . . The indictment also charged [the three EBS defendants] with selling millions of dollars of Enron stock while making these false statements.").

48. *Id.*

49. *Id.* at 376.

50. "The jury hung on 20 counts of insider trading and 99 counts of money laundering" that were based on insider trading. *Id.*

51. *Yeager I*, 446 F. Supp. 2d at 726.

acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public."[52] In contrast, the district court in *Yeager I* interpreted the jury's acquittal to say that Yeager did not knowingly and willingly participate in a scheme to defraud in connection with the 2000 Analyst Conference and press releases, but not that he lacked insider information.[53] In *Yeager II*, however, the Fifth Circuit ruled out the possibility that the jury acquitted Yeager based on a finding that he did not participate in making the alleged material misrepresentations.[54]

Despite reading his securities fraud acquittal differently, both the district court and the Fifth Circuit denied Yeager's motion to dismiss the counts in the new indictment. The district court concluded that "Yeager's acquittal on the conspiracy, securities fraud, and wire fraud counts of the Indictment does not completely bar the government from retrying [him] on the charges of insider trading and money laundering."[55] Alternatively, relying on *United States v. Larkin*,[56] the Fifth Circuit concluded that the presence of the apparently inconsistent hung counts "ma[de] it impossible . . . to decide with any certainty what the jury necessarily determined" and that therefore Yeager could not invoke the collateral estoppel protection.[57]

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52. *Yeager II*, 521 F.3d at 378.

53. *Yeager I*, 446 F. Supp. 2d at 735 ("[T]he Court finds that the jury necessarily determined that Defendant Yeager did not knowingly and willfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases. . . . [This] defense, if believed by the jury, would not negate the government's evidence and contention that Yeager possessed and used material nonpublic information at the time he made trades of Enron stock. Yeager's defense would only establish that Defendant Yeager did not participate in the overall scheme to defraud.").

54. At Yeager's trial, the judge instructed the jury that, to convict Yeager on securities fraud, the government needed to establish beyond a reasonable doubt that "Yeager participated in making material representations or omissions" (first element) and that "Yeager acted 'willfully, knowingly and with intent to defraud'" (second element). *Yeager II*, 521 F.3d at 377. According to the Fifth Circuit's reading of the record, the jury could have acquitted Yeager of securities fraud "on the basis of the first element by concluding that there were no misrepresentations or omissions made at the conference" or "on the basis of the second element by finding that Yeager did not knowingly make misrepresentations and omissions because he believed the presentations were truthful," that is, by concluding that Yeager acted in good faith. *Id.*

55. *Yeager I*, 446 F. Supp. 2d at 735.

56. United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979).

57. *Yeager II*, 521 F.3d at 378. The court relied on circuit precedent in reaching this holding. *Id.* at 379 (citing *Larkin*, 605 F.2d at 1370).

In *Yeager III*, the Supreme Court based its narrow legal holding on the Fifth Circuit's reading of the record[58] and reversed the Fifth Circuit's holding, overruling *Larkin* and holding an inconsistent hung count to be a "nonevent" that does not affect the *Ashe* analysis.[59] Although the Supreme Court acknowledged the disparate readings of the jury's acquittal in *Yeager I* and *II*, it "decline[d] to engage in a fact-intensive analysis of the voluminous record" to determine what the jury necessarily decided when it acquitted Yeager.[60] Instead, without providing any guidance on how to execute this task, the Court left the Fifth Circuit to "revisit its factual analysis [in *Yeager II*] in light of the Government's arguments [in *Yeager III*]."[61]

As this Part has explained, *Ashe* provided lower courts with some general direction about what to look at in determining what a jury necessarily decided in acquitting a defendant.[62] Specifically, *Ashe* directs courts to conduct a fact-intensive examination of the prior proceeding's record.[63] On remand, the Fifth Circuit explained that "freed from the chains of *Larkin* it is clear that under our initial *Ashe* analysis the jury made a finding in acquitting Yeager that precludes prosecution on insider trading."[64] The court of appeals declined the Supreme Court's "invitation to revisit" the *Ashe* analysis, denying the government's motion requesting a hearing to reconsider other possible grounds for the jury's acquittals.[65]

The dramatically different interpretations by the Fifth Circuit and the district court regarding the jury's decision to acquit Yeager raise questions about the *Ashe* analysis. Major collateral estoppel consequences flow from this analysis. Indeed, *Yeager I* and *II*'s different readings of the jury's acquittal carry opposite collateral

58. Yeager v. United States (*Yeager III*), 129 S. Ct. 2360, 2370 (2009) ("Our grant of certiorari was based on the assumption that the Court of Appeals' interpretation of the record was correct.").

59. *Id.* at 2367 ("Unlike *Ashe*, the case before us today entails a trial that included multiple counts rather than a trial for a single offense. And, while *Ashe* involved an acquittal for that single offense, this case involves an acquittal on some counts and a mistrial declared on others. The reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal.").

60. *Id.* at 2370.

61. *Id.*

62. *See supra* notes 40–43 and accompanying text.

63. *See supra* note 40 and accompanying text.

64. United States v. Yeager (*Yeager IV*), 334 F. App'x 707, 709 (5th Cir. 2009).

65. *Id.*

estoppel implications. *Yeager I*'s conclusion that the jury did not necessarily decide the insider trading charges against him would not bar a successive prosecution. The Fifth Circuit's conclusion that "the possession of insider information was a critical issue of ultimate fact in all of the charges" would, however, trigger the collateral estoppel protection.[66] Discrepancies seem inevitable when courts have only a general verdict in hand.

II. NULLIFICATION NOSTALGIA IN THE CRIMINAL JUSTICE SYSTEM

Many features of the criminal justice system, including the general verdict, are justified by nullification—the jury's "implicit power" to exercise lenity and acquit a defendant against the weight of the evidence.[67] There is great debate over whether juries have the right to nullify, and the Supreme Court has never squarely addressed the question. Many of the Court's decisions, however, including its approach to inconsistent verdicts, exhibit nostalgia for the Framer's view of nullification as a tyranny-preventive device.[68] This Part first explores the Supreme Court's invocation of nullification in *United States v. Powell*,[69] the leading case on inconsistent verdicts. It then proceeds to reexamine the traditional disfavor of special verdicts in the criminal context based on preserving the possibility of nullification. This Part concludes by describing how the nullification debate has evolved from the time of the Framers.

A. Nullification-Regarding Features of the Criminal Justice System

1. *The Supreme Court's Do-Nothing Approach*[70] *to Verdict Inconsistency*. Internal inconsistency[71] in the jury's verdict makes a

66. *Yeager III*, 129 S. Ct. at 2368–69.

67. Irwin A. Horowitz, *Jury Nullification: An Empirical Perspective*, 28 N. ILL. U. L. REV. 425, 426 (2008) ("The criminal jury's power to deliver a verdict counter to both law and evidence resides in the fact that a general verdict requires no explanation by the jury." (footnote omitted)). *But see id.* ("[J]ury nullification does not always lead to 'merciful' acquittals, but rather may engage jurors' emotions that may result in a vindictive verdict." (footnote omitted)).

68. *See id.* ("The framers of the U.S. Constitution considered the jury in criminal trials to be a fundamental safeguard against the power of the government." (footnote omitted)).

69. United States v. Powell, 469 U.S. 57 (1984).

70. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 772 (1998).

71. *See* Leipold, *supra* note 21, at 1349–50 ("When a jury acquits a person of one crime (accepting a bribe, for example) but convicts them of a related crime (failure to report the bribe income) the verdict is internally inconsistent.").

defendant vulnerable to successive prosecution by making it more difficult to determine what a jury necessarily decided and therefore more difficult to invoke the collateral estoppel protection. Verdict inconsistency indicates that the jury failed to follow the court's instructions, but it does not indicate the reason for this failure. The jury may have been confused or mistaken about the evidence or instructions,[72] which is more likely in cases like *Yeager*, in which there is legal and evidentiary complexity involving multiple offenses with common issues of underlying fact.[73]

Inconsistency can also result when the jury decides to exercise its power to dispense lenity.[74] The Supreme Court has held that inconsistent verdicts must stand because there is no way to tell whether the source of verdict inconsistency was "mistake, compromise, or lenity."[75] Although courts engage in various pre-verdict attempts to prevent the jury from making mistakes,[76] they are unwilling to disturb the possibility that the jury exercised lenity once a verdict has been returned. Thus, early intervention to prevent inconsistency borne of jury mistake and confusion is crucial; once the jury returns inconsistent verdicts, nothing can be done.

The Supreme Court established its do-nothing approach to inconsistent verdicts in *Powell*. A jury acquitted Betty Lou Powell of possessing cocaine with intent to distribute but convicted her of using a telephone to facilitate that crime.[77] Powell sought to reverse the inconsistent conviction on collateral estoppel grounds, arguing that the jury's acquittal on the possession charge necessarily decided an

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72. *See* Muller, *supra* note 70, at 798 ("Through mistake or confusion, a jury might misunderstand the elements of the crime, the allocation of the burden of proof, the effect of the defendant's failure to testify, or other key aspects of the court's instructions.").

73. *See id.* at 776 ("One of the most fertile settings for producing logically inconsistent verdicts is the compound crime—the crime . . . that has another charged crime as one of its elements. As these sorts of offenses have proliferated in recent years, so too has the opportunity for inconsistent verdicts." (footnote omitted)).

74. Leipold, *supra* note 21, at 1350 (noting that a jury may "t[ake] pity on the defendant and partially nullif[y] the charges").

75. United States v. Powell, 469 U.S. 57, 65 (1984).

76. *See* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 883–84 (1999) ("There is no dispute that jury mistakes are to be avoided. To this end, courts have experimented with a variety of changes in procedure, such as allowing jurors to take notes, to submit written questions to the judge, to receive preliminary instructions, to take written instructions into the jury room, and to be instructed in plain language that laypersons can understand. All of these procedural changes, many drawn from empirical studies, are directed toward helping juries avoid mistakes." (footnotes omitted)).

77. *Powell*, 469 U.S. at 60.

element of the phone count.[78] The Supreme Court refused to reverse her conviction, reasoning that, "the jury, convinced of guilt, [may have] properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity arrived at an inconsistent conclusion on the lesser offense."[79] In addition to the possible exercise of lenity, the *Powell* Court noted the government's inability to seek review and its general reluctance to speculate about jury deliberations as reasons for doing nothing about the inconsistency.[80]

2. *Reexamining the Traditional Disfavor of Special Verdicts*. Like the do-nothing approach to inconsistent verdicts, unwillingness to look behind the general verdict has been justified by the need to preserve the jury's independence and the possibility of nullification.[81] Although it is a common refrain that special verdicts are disfavored in the criminal context, "[t]his truism is often recited reflexively . . . rather than as a conclusion following sustained analysis."[82] There is no absolute prohibition against the use of special verdicts in the criminal context.[83] Indeed, they are required in federal treason cases.[84] In addition, when it is important for purposes of federal sentencing to determine a particular fact, supplemental special interrogatories are often used.[85]

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78. *Id.*

79. *Id.* at 65.

80. *Id.* at 68–69.

81. *See* United States v. Desmond, 670 F.2d 414, 416 (3d Cir. 1982) ("Some of the antipathy toward special verdicts in criminal trials has its roots in the doctrine of 'jury nullification.'").

82. Leipold, *supra* note 21, at 1355 n.192.

83. *Desmond*, 670 F.2d at 416.

84. *See* U.S. CONST. art. III, § 3 (requiring a finding of an overt act in treason cases, or a confession in open court).

85. For example, special interrogatories have been utilized in determining whether and what type of weapon the defendant used in a violent or drug-related crime. *See, e.g.*, United States v. Peña-Lora, 225 F.3d 17, 30 (1st Cir. 2000) ("[T]he district courts are vested with *discretion* to employ special verdict forms in [criminal] cases—*i.e.* where a section 924(c) count [of knowingly importing into, or possessing within, the United States firearms or ammunition] lists *both* a regular 'firearm' and a 'machinegun.'" (second alteration in original)); United States v. Sims, 975 F.2d 1225, 1235–36 (6th Cir. 1992) ("[The court may] submit[] special interrogatories . . . to the jury, requiring that if the jury returns a guilty verdict . . . it must specify which category . . . of weapons it . . . found the defendant was using or carrying."); United States v. Smith, 938 F.2d 69, 70 (7th Cir. 1991) (discussing how special verdicts, though "generally not favored in criminal cases," are permitted, including in situations where "the defendant's offense turns on factual findings"). Special verdict forms have also been used to determine "factors that increase applicable statutory maximum sentences," James K. Robinson,

Courts have used special verdicts as a means to prevent jury confusion and mistake in complex criminal cases. The Ninth Circuit, for example, requires special verdicts "when a court permits facts which pose a genuine possibility of juror confusion to go to the jury."[86] The increasing use of special verdicts in RICO cases[87] indicates judicial awareness that greater complexity limits the effectiveness of general verdicts as a defendant-protective device. In *United States v. Coonan*,[88] for example, the Court of Appeals for the Second Circuit approved special interrogatories designed to prevent prejudicial spillover between multiple defendants and to vindicate the defendant's constitutional right to unanimity on the predicate offenses.[89]

General verdicts are thought to preserve the jury's ability to dispense lenity against the weight of the evidence because the jury, when it returns a general verdict of acquittal, does not have to explain its decision, which is absolutely final.[90] It was not uncommon in seventeenth-century criminal trials for a judge to force a jury to disclose its reasons, sending the jury back for further discussion if the judge disagreed with its reasoning.[91] Therefore, the Framers were concerned that special verdicts could be used to hamstring the jury into convicting a defendant.[92] In 1670, the famous *Bushell's Case*[93]

Preface: Thirtieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1999-2000, 89 GEO. L.J. 1045, 1048–49 (2001) (explaining that after the "*Apprendi* decision . . . led to a flood of challenges to federal sentences," federal prosecutors began drafting special verdict forms to be used in submitting to the jury factors that increase applicable statutory maximum sentences), and aggravating factors in capital cases, *see* Ring v. Arizona, 536 U.S. 584, 585 (2002) (holding that juries and not judges must find aggravating circumstances in death penalty cases).

86. United States v. Delgado, 4 F.3d 780, 792 n.5 (9th Cir. 1993).

87. *See* Cynthia L. Randall, Comment, *Acquittals in Jeopardy, Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283, 319 (1992) ("Increasingly, courts are using special interrogatories in RICO cases to compel the jury to specify the predicate acts upon which a RICO conviction is based." (footnote omitted)).

88. United States v. Coonan, 839 F.2d 886 (2d Cir. 1988).

89. The prosecution offered multiple predicate offenses, and the interrogatories asked the jury to find that each RICO defendant participated in two predicate acts. *Id.* at 890.

90. *See* Marder, *supra* note 76, at 914 (explaining that the general verdict, where "[the jury] says only whether the defendant is guilty or not guilty, and provides no reasons for its decision," gives the jury a private space to "interpret[] the judge's instructions and decide[] whether and how to follow them").

91. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 284–89 (1978).

92. *Cf.* United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969) (discussing how, if a juror is asked progressive questions, the "juror, wishing to acquit, may be formally catechized. . . . [and]

"prohibited the Crown from punishing the jury for verdicts deemed unlawful or rebellious."[94] And in the eighteenth century, a colonial jury "[f]amously . . . acquitted printer John Peter Zenger of sedition when he certainly violated the local law prohibiting criticisms aimed at representatives . . . of the Crown."[95]

Despite the origins of the general verdict as a jury- and defendant-protective device, "it is not obvious that preserving the right to nullify is worth the cost to innocent defendants, who might be relieved of the burdens of a false charge by a more informative verdict."[96] As one federal judge has explained, "the general verdict . . . confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations."[97] The general verdict obscures whether the jury has exercised nullification or made a mistake about the evidence or the law.[98]

As the different readings of Yeager's acquittal in *Yeager I* and *II* demonstrate, it is almost impossible to determine from the words "not guilty" what the jury has necessarily decided. This determination, however, is required to invoke the collateral estoppel protection, which the Supreme Court has deemed part of the Fifth Amendment right against double jeopardy. Thus, in cases like *Yeager* involving multiple offenses with common issues of underlying fact, the opacity of the general verdict imperils the defendant's access to an important constitutional protection.

B. The Evolution of the Great Nullification Debate

The Supreme Court has never squarely addressed the nullification question, and its allusions to nullification are

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led to vote for a conviction which, in the large, he would have resisted," but noting that "the jury, as the conscience of the community, must be permitted to look at more than logic").

93. *Bushell's Case*, (1670) 124 Eng. Rep. 1006 (C.P.).

94. Horowitz, *supra* note 67, at 428 (footnote omitted).

95. *Id.* at 429 (footnote omitted).

96. Leipold, *supra* note 21, at 1355.

97. Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 61 (2d Cir. 1948).

98. *See* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 258 (2003) ("A wrongheaded acquittal . . . is not necessarily nullification. . . . Identifying and separating 'mistake' from 'nullification' is difficult, making accurate assessment of data on the incidence of either difficult.").

inconsistent. On the one hand, the Court has characterized the act of nullification as "lawless,"[99] producing verdicts returned for "impermissible reasons."[100] On the other hand, the Court has explained that it "would be totally alien to our notions of criminal justice" to prohibit jury nullification.[101] The *Powell* Court invoked the latter idea when it described "the jury's historic function[] in criminal trials[] as a check against arbitrary or oppressive exercises of power by the Executive Branch."[102] This tyranny-preventive view of the jury is also apparent in the Supreme Court's decision incorporating the Sixth Amendment right to trial by jury.[103]

Despite efforts to silence nullification advocacy in the courtroom,[104] the nullification debate has continued to sound in both academic circles and as part of a grass roots movement.[105] Whereas the opponents of nullification see it as a form of unchecked power to be avoided, its champions see nullification as a desirable and independent constitutional good. Other commentators accept nullification as an inevitable corollary to courts' traditional reluctance to engage in post-verdict scrutiny.[106]

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99. Strickland v. Washington, 466 U.S. 668, 695 (1984).

100. Harris v. Rivera, 454 U.S. 339, 346 (1981).

101. Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976).

102. United States v. Powell, 469 U.S. 57, 65 (1984).

103. *See* Duncan v. Louisiana, 391 U.S. 145, 145, 156 (1968) ("[T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.").

104. *See generally* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998) (discussing the history of jury nullification in state and federal courts, and arguing that the Constitution does not support jury nullification and that great costs will result if the power is expanded beyond the level at which it exists today).

105. NANCY S. MARDER, THE JURY PROCESS 194 (2005) ("Courts, by opting not to instruct juries on nullification, have created a void into which special-interest groups and individuals have stepped. These special-interest groups and individuals are often willing to undermine respect for the jury and the court because its [*sic*] serves their organizational goals."). High-profile cases like the O.J. Simpson and Rodney King trials, suspected by many commentators to be examples of nullification, have fueled this debate. Marder, *supra* note 76, at 877–78.

106. *See* JONAKAIT, *supra* note 98, at 249 ("The doctrine that jurors cannot be held legally accountable for their decisions . . . protects juries if they acquit in disregard of the law."). Every student of evidence reads *Tanner v. United States*, 483 U.S. 107, 116–17, 127 (1987), in which the Supreme Court refused to allow jurors who came forward to report shocking drug and alcohol abuse to testify in a post-verdict evidentiary hearing. This decision serves several important policy goals including protecting jurors from harassment by disgruntled litigants and preserving

Professor Nancy Marder has explained that one's view of nullification depends on one's conception of the jury's proper role.[107] Adherents of the conventional view—that the jury's role is to find facts[108]—see jury nullification as intruding on the province of the judiciary, legislature, and executive[109] and threatening the rule of law.[110] Under an alternative conception of the jury, which Professor Marder calls the "process view,"[111] nullification provides the legislative and executive branches with valuable feedback.[112] According to this view, the jury safeguards the individual defendant by bridging the gap between necessarily general criminal statutes[113] and specific crimes and by checking national laws out of touch with local standards.[114]

Jurors inevitably approach their task armed with more than logic,[115] and this is seen, for the most part, as a desirable feature of the criminal justice system. Judge Learned Hand, for example, characterized the jury verdict as providing "slack [in] the enforcement of law, tempering its rigor by the mollifying influence of current

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finality of process. *Id.* at 119–25. As the *Tanner* Court acknowledged, the jury system would not likely "survive [post-verdict] efforts to perfect it." *Id.* at 120.

107. Marder, *supra* note 76, at 880.

108. Judges typically instruct juries that they are factfinders. *Id.* at 904.

109. *See id.* at 905 ("The jury's role is narrowly envisioned by the conventional view, and to the extent juries perform more than fact finding or application of law in a narrow sense, they are seen as overstepping their bounds in the political schema and threatening the other branches' roles."); *id.* at 907 ("[J]uries that nullify in response to social conditions . . . harm the legislature and executive . . . by appropriating tasks that are best left to these other branches.").

110. *See id.* ("To the judge . . . jury nullification is a form of insurrection, and not surprisingly, judges often write or speak about nullification as leading to 'chaos' or 'anarchy.' Jury nullification is a threat not only to the judge's task, but also to the premise of the judicial system, which is that laws should be applied uniformly." (footnote omitted)).

111. *Id.*

112. *See id.* at 926 ("[A] jury that acquits so as not to apply the law to a particular defendant provides feedback to the executive and a jury that acquits so as not to apply a bad law provides feedback to the legislature . . . .").

113. *See id.* at 927 (explaining that "the nullifying jury . . . can [] be viewed as assisting the legislature" because legislators must "create general laws both because they cannot foresee every variation that may arise and also because legislators may have competing views about what should be included in legislation and must settle for broad language if any laws are to be passed").

114. *See id.* at 929 ("This occurred with the Fugitive Slave Act, in which Northern juries often refused to give effect to the law.").

115. *Id.* at 911 ("[The jurors] must engage in a weighing of the evidence presented by the State, and it is likely that this amorphous process . . . will be shaped by attitudes they hold on a wide range of issues, from whether they distrust the State and worry about it abusing its power to how vulnerable they feel to crime . . . .").

ethical conventions."[116] In *Duncan v. Lousiana*,[117] in which the Supreme Court incorporated the Sixth Amendment right to jury trial, the Court invoked a classic study of the jury to support the proposition that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[118]

The Supreme Court's conception of the jury's proper role is nevertheless uncertain, and the Court has never spoken directly to the nullification question. In *Sparf v. United States*,[119] the Court held that it is the court's duty to define the law and the jury's duty to apply it.[120] Justice Harlan, writing for the Court, suggested that the Framers were not uniformly in favor of preserving the possibility of nullification and expressed concern about giving juries too much power:

> If a petit jury can rightfully exercise [nullification] over one statute of Congress, they must have an equal right and power over any other statute, and indeed over all the statutes. . . . If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control.[121]

In a later case, though, the Court stepped back from its anti-nullification position, explaining that *Sparf* does "not support [the] concept of the criminal jury as mere factfinder."[122] The Court drew a distinction between "tell[ing] the jury what the applicable law is" and "requir[ing] the jury to apply the law,"[123] which the Court held would be inconsistent with the Sixth Amendment.

The notion that the jury serves as a final check on prosecutorial and legislative authority accords well with the Framers' system of checks and balances; however, jury nullification may also be a

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116. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942), *rev'd on other grounds*, 317 U.S. 269 (1942).

117. Duncan v. Louisiana, 391 U.S. 145 (1968).

118. *Id.* at 157 (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 4 n.2 (1966)).

119. Sparf v. United States, 156 U.S. 51 (1895).

120. *Id.* at 100–03.

121. *Id.* at 71 (quoting United States v. Callendar, 25 F. Cas. 239, 256 (C.C. Va. 1800)).

122. United States v. Gaudin, 515 U.S. 506, 511–15 (1995).

123. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 68 (2000).

dangerous form of unchecked power.[124] Some historical examples of nullification, such as Southern white juries' refusal to convict whites charged with crimes against African Americans, are rightly condemned.[125] In the modern era, so-called "Bronx juries" have stirred up concerns about abuse of the jury's unreviewable discretion.[126] Furthermore, it may no longer be as desirable for juries to second-guess the legislature as it was in the Framers' day.[127]

III. THE SOLUTION: SPECIAL VERDICT FORMS CLARIFYING THE ISSUES OF ULTIMATE FACT COMMON TO OVERLAPPING OFFENSES

Improving the clarity of the jury's verdict using special verdict forms would benefit defendants like Yeager seeking to invoke the collateral estoppel protection. Special verdict forms could also benefit prosecutors seeking to salvage a hung count. Section A of this Part proposes creating a federal rule of criminal procedure to standardize the use of special verdict forms in cases like *Yeager*—cases involving overlapping but not coextensive charges based on the same underlying conduct. As Section B explains, the proposal advocates for clarity and legitimacy for their own sake, along lines that will frequently favor defendants but may also favor the government. Indeed, the government is a beneficiary any time the jury is forced to be more rational. Section C concludes this Part by anticipating and responding to a likely critique of the proposal—that it would impinge on the jury's traditional prerogative to exercise lenity.

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124. *See* JONAKAIT, *supra* note 98, at 263 ("We do not want people 'taking the law into their own hands.'").

125. *See* ABRAMSON, *supra* note 123, at 61–62 (describing this "vicious side to jury nullification").

126. Marder, *supra* note 76, at 901. In a highly controversial law review article, Professor Paul Butler openly encouraged African-American juries to engage in nullification to protest the criminal justice system's treatment of African-American defendants. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 709–12 (1995) (explaining that the jury is the only forum for democratic change accessible by African Americans).

127. John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 507 (2002) ("As society has become more heterogeneous and more complex, legislatures have to make difficult policy choices taking account of a range of considerations including morality, political feasibility and social and economic consequences and juries are just not equipped to reevaluate these policy judgments.").

A. *The Proposal: A Federal Rule of Criminal Procedure on Special Verdicts*

The Framers could not have anticipated the need to apply the collateral estoppel doctrine in the criminal context to vindicate the protection against double jeopardy.[128] Thus, the disconnect between the Framers' preference for the general verdict, on the one hand, and the requirement of a determination of what a jury necessarily decided to invoke the collateral estoppel protection, on the other hand, is understandable. By constructing special verdict forms tracking the issues of underlying fact common to overlapping but not coextensive charges, trial courts can bridge this gap and shore up the defendant's protection against double jeopardy.

In contrast to the ex post solution proposed by other commentators,[129] this Note recommends pre-verdict intervention to ascertain the preclusive effect of an acquittal in cases like *Yeager*. Pre-verdict intervention is consistent with the Supreme Court's systemic reluctance to engage in post-verdict scrutiny, for which there is a sound policy rationale.[130] Insulating jury deliberations promotes full and frank communication,[131] protects jurors from harassment,[132] and helps ensure finality of process.[133] The Supreme Court has invoked these concerns not only to justify its do-nothing approach to inconsistent verdicts[134] but also to justify the longstanding rule that juror testimony is inadmissible to impeach a jury verdict.[135] Indeed,

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128. *See supra* note 17 and accompanying text.

129. *See, e.g.*, Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1829 (1997) ("[T]he most sensible approach would be to allow (but not oblige) the defendant to request specific findings from the jury *after* the jury has rendered its general verdict."); Randall, *supra* note 87, at 317–25 (proposing that acquitted defendants be given the opportunity to request a special interrogatory, but "only after the jury reaches a general verdict of acquittal").

130. United States v. Powell, 469 U.S. 57, 68–69 (1984).

131. Tanner v. United States, 483 U.S. 107, 120 (1987).

132. McDonald v. Pless, 238 U.S. 264, 267 (1915) (arguing that allowing juror testimony to impeach a verdict would encourage "harass[ment] . . . by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict").

133. *See Tanner*, 483 U.S. at 120 ("Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.").

134. *See supra* note 80.

135. *Tanner*, 483 U.S. at 121 ("Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences.").

the insulation of the jury's verdict from second-guessing is a feature without which the criminal justice system could not likely survive.[136]

As Professor Mark Brodin has observed, "the history of the jury is one of constant tension between the desire to preserve its independence on the one hand and to constrain its discretion on the other."[137] This Note respectfully suggests that, in light of the problem illustrated by *Yeager*, the Judicial Conference of the United States, through its Committee on Criminal Rules, consider drafting and adopting a special verdict form for use in cases like *Yeager* involving overlapping but not coextensive charges based on the same underlying facts.

Establishing a federal rule of criminal procedure in this vein would legitimize the use of special verdicts in the criminal context and promote uniform access to the collateral estoppel protection for similarly situated defendants. The new rule should be analogous to Federal Rule of Civil Procedure 49, which provides judges with two procedural options for using special verdict forms. But several of the options outlined in Rule 49 would need to be hemmed to fit the constitutional dimensions of the criminal context.

Under the first procedural option described in Rule 49,[138] the jury resolves specified factual issues and the judge determines whether the defendant is liable under the law controlling those facts. This procedure would not be acceptable in the criminal context. Under no circumstances may a federal judge direct a verdict of guilty in a criminal case.[139] Under the second procedural option described in Rule 49,[140] the jury returns forms for a general verdict as well as

136. *Id.* at 120 ("There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it.").

137. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 25–26 (1990).

138. The rule provides: "The court may require a jury to return *only a special verdict* in the form of a special written finding on each issue of fact. . . . by [either] submitting written questions susceptible of a categorical or other brief answer; submitting written forms of the special findings that might properly be made under the pleadings and evidence; or using any other method that the court considers appropriate." FED. R. CIV. P. 49 (emphasis added) (headings omitted).

139. Sparf v. United States, 156 U.S. 51, 105–06 (1895).

140. The rule provides: "The court may submit to the jury *forms for a general verdict, together with written questions* on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general

written questions on one or more issues of fact that the jury must decide. This procedure would also require modification in the criminal context. In the civil context, the judge can use the jury's answers to the special interrogatories to override its verdict.[141] But in the criminal context, the jury must retain the power to make the ultimate determination of guilt.[142]

Under the Due Process Clause of the Sixth Amendment, a criminal defendant has the right to demand that the jury find him guilty of every element of the offense charged.[143] Thus, trial judges are required to instruct the jury on every element of the offense.[144] In addition, many judges—although they are not required to do so—will give the jury written instructions.[145] Surveys have shown that lawyers and jurors generally favor giving the jury access to written instructions during deliberation.[146]

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verdict and answer the questions in writing, and must direct the jury to do both." FED. R. CIV. P. 49 (emphasis added) (headings omitted).

141. *See* KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 8.08, at 555 (5th ed. 2000) (explaining that, in the event that one or more of the jury's answers "is irreconcilably inconsistent with the general verdict, the answers prevail and judgment may be entered pursuant to Civil Rule 58 in accordance with the answers notwithstanding the general verdict, or, the court may return the jury for further consideration of its answers and verdict or order a new trial"); *see also* FED. R. CIV. P. 49 ("When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers. . . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may [either] approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict; direct the jury to further consider its answers and verdict; or order a new trial. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial." (headings omitted)).

142. The Sixth Amendment right to trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

143. United States v. Gaudin, 515 U.S. 506, 511 (1995).

144. O'MALLEY ET AL., *supra* note 141, § 7.03, at 470.

145. *Id.* at 509. In European countries, judges provide the jury with detailed written information to guide their deliberations. *See* Jackson, *supra* note 127, at 518 (noting that judges in Belgium, Demark, and Norway provide juries with "a written list of ingredients concerning each offence, possible defenses and mitigating factors"). Spain, in particular, has an extremely accountable jury system. *Id.* at 518–19 (explaining that in Spain "the parties draw up with the judge a document containing the facts put forward by the prosecution and defense in the course of the trial" and then "[a]fter voting on each of these issues, the jury has to draw up a document under the five headings of the facts declared proved, the facts not proved, the declaration guilty or not guilty, the reasons for why they consider the facts proved or not and, finally, the voting incidents during deliberation").

146. William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL. F. 119, 131.

Special verdict forms tracking the overlapping issues of law and fact in cases like *Yeager* would aid the jury in its deliberations. As is the practice with jury instructions, the judicial conferences for each district could draft model special verdict forms tracking the general overlap between overlapping but not coextensive charges. Then, the parties could adapt the general form to fit the specific issues in the case. The trial judge would arbitrate the parties' negotiation of the forms.

The procedures governing the formulation of special verdict forms should mirror those governing jury instructions found in Federal Rule of Criminal Procedure 30.[147] Specifically, parties should submit their requests for special verdict forms to the judge and other parties at the close of evidence.[148] And, just as Federal Rule of Criminal Procedure 30 gives the court broad discretion to determine the propriety of requested instructions,[149] this Note's proposal would vest discretion in the trial judge to determine the ultimate content of special verdict forms. The judge should show the trial lawyers the special verdict forms before closing arguments "so that [counsel] may intelligently argue the case to the jury."[150] The court must also give counsel an opportunity to object to special verdict forms before they are submitted to the jury, as is the practice with regard to jury instructions.[151] To ensure that the trial court has an opportunity, before the jury retires, to address any errors in a special verdict form, the failure to make a timely objection should operate as it does with instructions: unless there has been "plain error affecting substantial rights,"[152] the right to object on appeal to the instructions made to the jury is waived.[153] As in the civil context, timely objections to special

147. FED. R. CRIM. P. 30.

148. *Cf. id.*

149. *See* O'MALLEY ET AL., *supra* note 141, § 7.03, at 466 (explaining that it is in the court's discretion to refuse requests that are biased, unclear, or redundant).

150. United States v. Pelullo, 964 F.2d 193, 220 (3d Cir. 1992) (quoting United States v. Wander, 601 F.2d 1251, 1262 (3d Cir. 1979)).

151. *See* FED. R. CRIM. P. 30 ("A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence."); O'MALLEY ET AL., *supra* note 141, § 7.04, at 480–81 ("Objections, under the civil and criminal rules, must be made out of the hearing of the jury, and upon request in criminal cases, out of the jury's presence.").

152. FED. R. CRIM. P. 52(b).

153. *See id.* 30(d) ("Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)."); O'MALLEY ET AL., *supra* note 141, § 7.01, at 457 ("Failure to interpose a timely and specific objection to possible error or omission in the

verdict forms should be reviewed under an abuse of discretion standard.[154]

Given the presumption of innocence and the traditional preference for using general verdicts, a trial judge arbitrating the negotiation of special verdict forms should give solicitude to the defendant. The judge must take care in drafting special interrogatories to avoid inappropriately leading the jury's deliberations. The judge should also give great weight to a defendant's objection to a special verdict form.[155]

Courts tend to accept special interrogatories proposed to benefit defendants,[156] but they do not typically submit special interrogatories to the jury over the defendant's objection.[157] This latter tactic is not viewed favorably on appeal. In *United States v. Spock*,[158] for example, the First Circuit held that it was prejudicial for the district court to submit, over the defendants' timely objection to their form and content, ten yes or no questions to the jury to be answered in addition to the general verdict.[159]

If agreement on a special verdict form cannot be reached, it may be necessary to default to the general verdict. In *United States v. Ogando*,[160] for example, the defendants requested blank-form special interrogatories on the predicates to a continuing criminal enterprise charge. The judge preferred constructing a multiple-choice form, reasoning that the complexity of the case required more instruction

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instructions made by the trial court results in waiver of the objection on appeal unless there has been plain error affecting substantial rights.").

154. Giving judges the discretion over the submission, form, and content of special verdict forms introduces the potential for abuse of that discretion. In the civil context, abuse of this discretion constitutes reversible error, O'MALLEY ET AL., *supra* note 141, § 8.10, at 572 ("A trial court's refusal to utilize a special verdict or interrogatory requested by the defendant is subject to an abuse of discretion standard."), but reversal occurs rarely, *id.* at 541.

155. *See* Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 298 (2003) ("If there would be serious harm to the defendant . . . then the court should not give the special verdict, even if the benefit would be great.").

156. Randall, *supra* note 87, at 322.

157. JONAKAIT, *supra* note 98, at 251 ("Federal and state courts usually do not allow special verdicts or interrogatories if the criminal defendant objects to their use.").

158. United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

159. *See id.* at 182–83 ("There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step.").

160. United States v. Ogando, 968 F.2d 146 (2d Cir. 1992).

for the jury.[161] The defendants rejected the judge's proposed alternatives, however, and general verdicts were ultimately used.[162]

B. The Benefits of the Proposal to Defendants and the Criminal Justice System at Large

The offenses in the *Yeager* case—insider trading and securities fraud—are good candidates for using a special verdict form. The same underlying conduct can sustain a conviction on both charges, but the charges do not necessarily require the same proof in a given case. That is, the charges are overlapping but not coextensive. The securities fraud charges against Yeager were brought under 15 U.S.C § 78j(b), 15 U.S.C § 78ff, and 17 C.F.R. § 240.10b-5.[163] The indictment alleged that Yeager "made false and misleading statements at the January 20, 2000, analyst conference or that he failed to state facts necessary to prevent statements made by others from being misleading."[164] The insider trading charges were brought under 15 U.S.C § 78j(b), 15 U.S.C § 78ff, and 17 C.F.R. § 240.10b5-1.[165] The indictment alleged that Yeager "made 20 separate sales of Enron stock 'while in the possession of material non-public information regarding the technological capabilities, value, revenue and business performance of [EBS].'"[166]

Although the securities fraud and insider trading charges in Yeager's case appear very similar on the elements,[167] they are not

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161. *Id.* at 147–48.

162. *Id.* at 148.

163. Yeager v. United States (*Yeager III*), 129 S. Ct. 2360, 2363 n.1 (2009).

164. *Id.* at 2363.

165. *Id.* at 2363 n.1.

166. *Id.* at 2363–64 (quoting Fifth Superseding Indictment at 31, United States v. Hirko, No. H-03-93-05, 2004 WL 5653075 (S.D. Tex. Nov. 5, 2004).

167. Yeager's jury was instructed that, to convict on the securities fraud charges, the government was required to prove beyond a reasonable doubt that:

> (1) in connection with the purchase or sale of securities, the defendant either (i) employed a device, scheme, or artifice to defraud, or (ii) made any untrue statement or material omission of fact, or (iii) engaged in an act of fraud and deceit; and (2) acted willfully, knowingly, and with the intent to defraud; and (3) used, or caused to be used, any means or instrumentality of interstate commerce or of the mails.

United States v. Yeager (*Yeager I*), 446 F. Supp. 2d 719, 730 (S.D. Tex. 2006). To convict on insider trading, the jury was instructed that the government was required to prove beyond a reasonable doubt that:

> (1) in connection with the purchase or sale of securities, the defendant employed a device, scheme, or artifice to defraud; (2) acted willfully, knowingly, and with the intent to defraud; (3) used, or caused to be used, any means or instrumentality of

coextensive. Both the securities fraud and insider trading charges required the government to prove a knowing violation of Section 10(b)[168] and Section 32(a)[169] of the Securities Exchange Act of 1934. But whereas the securities fraud counts alleged a violation of SEC Rule 10b-5,[170] the insider trading counts alleged a violation of SEC Rule 10b5-1, which the SEC adopted in 2000.[171] Under Rule 10b5-1, a trade is "on the basis" of material nonpublic information when the trader is "aware" of material nonpublic information when making a purchase or sale, based on the "position that one who is aware of

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interstate commerce; and (4) used material, nonpublic information in his purchase or sale of Enron stock.

Id.

168. 15 U.S.C. § 78j(b) makes it unlawful

> [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (2006).

169. 15 U.S.C. § 78ff(a) criminalizes willful violations of the Securities Exchange Act of 1934:

> Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter, or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Id. § 78ff(a).

170. 17 C.F.R. § 240.10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2009).

171. Securities Exchange Act Release No. 34-43154 (Aug. 15, 2000).

inside information at the time of trading will have inevitably made use of such information."[172] Under the classical theory of insider trading, it suffices for conviction to prove that an insider defendant traded while in possession of material, nonpublic information. This violates the "relationship of trust and confidence [that exists] between the shareholders of a corporation and [the] insider[] who ha[s] obtained confidential information by reason of their position with that corporation."[173]

Yeager's indictment did not specify whether alleged false statements and omissions made at the 2000 analyst conference and in press releases were directly linked to the allegations that Yeager possessed insider information.[174] Yeager, however, argued that the indictment implied this direct link.[175] In *Yeager I* the district court noted that insider trading counts did not mention the 2000 analyst conference or the press releases and concluded that "the fate of the insider trading counts is not necessarily decided by the fate of the . . . securities fraud counts."[176] But the Fifth Circuit settled the issue in Yeager's favor, concluding that, "the jury, acting rationally, could have acquitted Yeager on securities fraud only by concluding that he did not have insider information."[177]

If the Fifth Circuit's *Ashe* analysis is accurate, then Yeager's jury either was confused, struck a compromise, or exercised its power to dispense lenity when it acquitted Yeager on the securities charges without also acquitting him on the insider trading charges. On

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172. MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 347 (4th ed. 2007).

173. Chiarella v. United States, 445 U.S. 222, 228 (1980) (footnote omitted); *see also* United States v. O'Hagan, 521 U.S. 642, 651–52 (1997) ("Under the 'traditional' or 'classical theory' of insider trading liability, [the rules] are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information.").

174. Fifth Superseding Indictment at 21–22, United States v. Hirko, No. H-03-93-05, 2004 WL 5653075 (S.D. Tex. Nov. 5, 2004); *see also* United States v. Yeager (*Yeager I*), 446 F. Supp. 2d 719, 728–29 (S.D. Tex. 2006) ("Furthermore, the insider trading counts against Defendant Yeager do not rely upon allegations of false statements and omissions made at the 2000 Analyst Conference and in press releases. The title of the insider trading counts does not mention the 2000 Analyst Conference and press releases, and nor does the text of the counts.").

175. *Yeager I*, 446 F. Supp. 2d at 726 ("With regard to the insider trading counts, Defendant Yeager specifically argues that '[a]t no point did the Government explain what material, nonpublic information Yeager was in possession of except by implication: when he allegedly made statements or omissions at the 2000 Analyst Conference and in press releases, Yeager knew that those statements were false, and that knowledge constituted material, nonpublic information that he was not permitted to trade on.'" (citation omitted)).

176. *Id.* at 729.

177. United States v. Yeager (*Yeager II*), 521 F.3d 367, 376–77 (5th Cir. 2008).

remand from the Supreme Court, the Fifth Circuit upheld this reading of the record.[178] Had Yeager been able to request a special verdict form with interrogatories clarifying the issues of ultimate fact common to the insider trading and fraud charges, the jury may not have deadlocked, resulting in an acquittal on both sets of charges.

Although using special verdicts in cases like *Yeager* will frequently favor defendants, their use could sometimes favor the government. If *Yeager I*'s *Ashe* analysis was correct, for example, then Yeager's jury acted rationally in acquitting him of securities fraud yet failing to reach a verdict on the insider trading charges. Under this scenario, the government should not be barred from reprosecuting him on the insider trading charges.[179] Had the jury been given a special verdict form with interrogatories tracking the underlying issues of fact common to the securities and insider trading charges, it might have revealed a rational deadlock based on the evidence.

Considering the disparate *Ashe* analyses in *Yeager I* and *II*, it is possible that the jury would have split the charges rationally if given such a special verdict form. From the government's perspective, a mixed outcome that is demonstrably rational is better than the apparently irrational result in *Yeager*. A rational mistried charge can be salvaged without implicating collateral estoppel concerns.[180]

Ideally, engaging in a forward-looking analysis at the close of evidence and constructing special verdict forms clarifying the issues would prevent jury mistake and confusion altogether.[181] As one

178. United States v. Yeager (*Yeager IV*), 334 F. App'x 707, 709 (5th Cir. 2009) ("Today, freed from the chains of *Larkin* it is clear under our initial *Ashe* analysis the jury made a finding in acquitting Yeager that precludes prosecution on insider trading . . . . We are satisfied that the panel conducted a proper review of Yeager's claim and the required collateral estoppel analysis under *Ashe* and will not do so again. We decline the invitation to revisit our settled findings.").

179. *See infra* note 180.

180. *See Preliminary Proceedings: Prosecutorial Discretion*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 219, 452 (2009) ("The Double Jeopardy Clause does not prohibit a retrial following a mistrial if, 'taking all the circumstances into consideration, there is a manifest necessity for [declaring a mistrial], or the ends of public justice would otherwise be defeated [by not allowing a retrial].'" (citation omitted)).

181. Field experiments have shown that juries that are given special verdict forms are better informed about the evidence, more understanding of the judge's instructions, and more confident in the accuracy of their verdict. *See, e.g.*, Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 29 (1994) (finding that the use of special verdict forms provided the greatest benefits by assisting jurors with legal and evidentiary complexity); Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCH. REV. 1, 1 (1990) (finding partial support for the theory that special verdict forms improve comprehension of jury instructions).

commentator has noted, "the special verdict can improve the deliberation process by packaging the dispute in distinct, manageable components, by focusing the jurors' attention on those critical issues, and by exerting pressure on them to decide those issues based solely on the evidence because their special findings will be recorded."[182] By clarifying what the jury necessarily decided, a special verdict form could improve an acquitted defendant's access to the collateral estoppel protection, minimizing the need for unnecessary relitigation and saving precious judicial and prosecutorial resources.[183] In addition to reducing the need for post-trial expenditure of these resources, special verdicts can also save resources during the trial by "expedit[ing] litigation because instructions are easier for the judge to frame at trial."[184]

C. Anticipating and Responding to the Lenity Critique

When it comes to the form of a verdict, there is a tradeoff between lenity and precision: preserving the possibility of nullification by using the general verdict sacrifices clarity and accuracy. For two reasons, the tradeoff between lenity and precision weighs in favor of using special verdict forms in cases involving multiple overlapping but coextensive federal criminal charges. First, the risk that a jury will return inconsistent verdicts out of mistake or confusion is heightened when the substance[185] or sheer volume[186] of the evidence challenges the limits of the jurors' memories and understanding. Second, defendants charged with multiple, overlapping offenses are more vulnerable to successive prosecution, placing accuracy at a premium.

Critics of this Note's proposal will likely argue that guilty defendants will be worse off if juries are unable to nullify under the cover of the general verdict. There are two responses to this

182. Brodin, *supra* note 137, at 58 (footnote omitted).

183. Randall, *supra* note 87, at 319.

184. Brodin, *supra* note 137, at 59 (explaining that in general verdict jury trials, "the judge must fully instruct the jury both on the law and its application to all possible constructions of the evidence").

185. *See, e.g.*, United States v. Korando, 29 F.3d 1114, 1115–18 (7th Cir. 1994) (characterizing the government's efforts to explain the structure of a racketeering scheme in violation of RICO as "decidedly less than elegant").

186. *See, e.g.*, United States v. Ogando, 968 F.2d 146, 149 (2d Cir. 1992) (noting that cases involving a continuing course of criminal conduct or multiple defendants may require a "recall of Homeric proportions" from jurors).

argument. First, even when special verdict forms are employed, juries disposed to acquit the defendant against the weight of the evidence could still do so based on reasonable doubt.[187] Indeed, the special verdict form should include a question paralleling the reasonable doubt instruction that the jury receives. Thus, if it intends to nullify, the jury can indicate on the special verdict form that the government failed to prove the defendant's guilt beyond a reasonable doubt.

The second response to the argument that defendants will be worse off if special verdict forms are given to the jury is this: various changes in the criminal justice system since the Framers' time have affected the degree to which the nullification-regarding features of the system actually serve the interests of defendants. The Federal Sentencing Guidelines, for example, greatly limit the jury's ability to bring the defendant's punishment in line with what the jury perceives to be the defendant's crime against society.[188] Although a jury might intuit that convicting a defendant of fewer counts will reduce the defendant's ultimate punishment,[189] so long as the jury convicts the defendant on at least one count, all relevant conduct—including acquitted conduct—can typically be introduced at the sentencing phase.[190] Short of acquitting the defendant of all charges,[191] a jury can

187. Marder, *supra* note 76, at 885–87 (noting that jurors "could nullify, but then say that their decision was based on reasonable doubt"); *see also* JONAKAIT, *supra* note 98, at 258 (explaining that jurors who acquit despite strong evidence of guilt consistently report having reasonable doubts, as opposed to disregarding the law).

188. *United States v. Booker*, 543 U.S. 220 (2005), preserved real offense sentencing by making the Federal Sentencing Guidelines advisory. *Id.* at 246. The available evidence shows that most judges still follow the Guidelines even though they are no longer mandatory. *See* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 240–44 (4th. ed. Supp. 2008) (providing empirical evidence that most judges post-*Booker* have followed the Guidelines). For a discussion of the jury's evolving role in criminal sentencing, see Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34–44 (2003).

189. *See* United States v. Maybury, 274 F.2d 899, 902 (2d Cir. 1960) ("The vogue for repetitious multiple count indictments may well produce an increase in seemingly inconsistent jury verdicts, where in fact the jury is using its power to prevent the punishment from getting too far out of line with the crime." (citation omitted)).

190. *See* Leipold, *supra* note 21, at 1332 ("The Federal Sentencing Guidelines require the judge to look at *all* the charged conduct, and increase the sentence if a preponderance of the evidence suggests guilt on the acquitted charges. . . . The imprecision of the general verdict permits this second evaluation of the evidence." (footnote omitted)); Muller, *supra* note 70, at 776 ("[I]t has become increasingly common for courts to sentence defendants on the basis of conduct of which they were acquitted—even inconsistently acquitted." (footnote omitted)); *see also* United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the

only influence the severity of the defendant's sentence by convicting the defendant only on the charge or charges with the lowest statutory maximum.[192] This is unlikely because the jury is not instructed on the sentencing consequences attached to the various charges.[193]

The Supreme Court's nostalgia for the Framers' vision of nullification as a tyranny-preventive device is in tension with modern district court judges' efforts to nullification-proof the courtroom.[194] In contrast to the practice in the Framers' day,[195] nullification advocacy by defense counsel is strictly prohibited.[196] Most modern jurors are completely unaware that they have the discretion to acquit a guilty defendant,[197] and judges exclude jurors who demonstrate willingness to engage in nullification.[198] "In most instances today, for jury

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acquitted charge, so long as that conduct has been proved by a preponderance of the evidence").

191. *But see* Leipold, *supra* note 21, at 1331–32 ("As every defense lawyer knows, an acquittal on fewer than all charges may be a hollow victory. . . . Thus, if defendant is charged with committing three bank robberies, and the jury convicts on the first count and acquits on the other two, the judge may still punish the defendant as if he had been convicted on all three counts." (footnote omitted)).

192. In this event, the ceiling imposed by the statutory maximum would prevent acquitted conduct from coming in. Of course, the number of convicted counts—which the jury does control—can make a difference in terms of the defendant's stigma and ultimate punishment under the Guidelines. But jurors are never instructed about the sentencing implications of their decisions. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1134 n.249 (2001) ("Juries are not told about penalties and indeed are forbidden to consider them.").

193. *Id.*

194. *See* GERTNER & MIZNER, *supra* note 15, at 197 ("Concomitant with the refusal to instruct the jury concerning nullification, courts have further held that counsel may not argue that theory in closing argument . . . .").

195. For example, Alexander Hamilton urged jurors to disregard their instructions and consider the propriety of the law in the seditious libel case of American journalist John Peter Zenger, and the jury returned its now-famous not guilty verdict. *See* ABRAMSON, *supra* note 123, at 73–75.

196. United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972) (refusing to instruct the jury on nullification, reasoning that "[a]n explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny").

197. *See* Marder, *supra* note 76, at 944 ("Jurors, who may have little knowledge of the history of the jury, may have no familiarity with the jury's power to nullify." (footnote omitted)); *see also* David C. Brody & Craig Rivera, *Examining the* Dougherty *"All-Knowing Assumption": Do Jurors Know About Their Jury Nullification Power?*, 33 CRIM. L. BULL. 151, 166 (1997) (explaining that most people do not know about the jury's ability to nullify).

198. Nullification-intent jurors have been dismissed even after the jury has begun to deliberate. For example, the Second Circuit held in *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997), that a trial judge alerted to the fact that a juror is urging nullification should interview the juror and remove him upon confirmation of his intent to nullify. *Id.* at 617. This

nullification to succeed, it must remain subterranean, unacknowledged, and undetected."[199] Therefore, the practice of nullification has lost a significant part of its tyranny-preventive value; covert nullification does not give the legislature any incentive to fix problem statutes.[200]

Finally, although nullification has existed since colonial days, some commentators reject the idea that nullification has any legal basis.[201] For example, Professor Andrew Leipold has observed that the courts have never explicitly approved nullification nor is there historical evidence that nullification is "embedded" in the Sixth Amendment.[202]

CONCLUSION

Whether borne of confusion, compromise, or lenity, jury inconsistency harms defendants' constitutionally protected interest in the finality of acquittals. In today's overfederalized and overcriminalized system, the average defendant's interest in improving accuracy outweighs a defendant's interest in preserving the possibility of nullification. Especially when multiple charges require the resolution of a common issue of ultimate fact, clarifying the overlapping issues and what the jury actually decides would protect a defendant.

In contrast, a general verdict can harm a defendant. In Yeager's case, for example, the opacity of the jury's acquittals precluded him from barring relitigation of issues of fact common to the acquittals and the hung counts.

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case required the court to navigate the conflict between the trial judge's "duty to dismiss jurors for misconduct" and the duty to "safeguard[] the secrecy of jury deliberations." *Id.* at 618. After weighing the competing interests, the court concluded that, once jury deliberations begin, trial judges should only interfere when issues are brought to their attention. *Id.* at 621–22. The trial judge had dismissed one juror after receiving a note from another juror that this juror had a "predisposed disposition" to nullify. *Id.* at 611. The Second Circuit took issue not with the trial judge's ability to dismiss a juror who is intent on nullification but with the fact that the trial judge dismissed the juror without making sufficient inquiry on his intent to nullify. *Id.* at 618.

199. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 240 (2007).

200. *See* Marder, *supra* note 76, at 906 ("[I]f jurors nullify to militate against the effects of a bad law, they reduce the legislature's incentive to act, thus increasing the chances that a bad law will remain on the books. A nullifying jury only masks the defective law by attempting to fix it on an ad hoc basis when what is required is a uniform correction.").

201. *See, e.g.*, Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 504 (1976).

202. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 283 (1996).

A federal rule of criminal procedure giving district court judges discretion to submit special verdict forms to the jury would make their use more routine and uniform in the criminal context. The prevention of jury mistake and the preclusion of unnecessary relitigation would not only protect defendants from double jeopardy but would also promote efficiency in the allocation of scarce judicial and prosecutorial resources. This savings should substantially offset the costs associated with formulating special verdict forms upon which the parties can agree.